87-1597

No.

Supreme Court, U.S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1987

ALABAMA POWER COMPANY,
Appellant,

v.

KAY CAPPS, Administratrix of
the Estate of Richard D. Capps,
Deceased,
Appellee.

On Appeal From the Supreme Court of Alabama

JURISDICTIONAL STATEMENT

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QUESTIONS PRESENTED*

1. Alabama's wrongful death statute[1] has been construed and applied to permit *only* punitive damages, and not compensatory damages; to permit such punitive damages for simple negligence *only* on a jury finding by a preponderance of the evidence *only*; and to permit a jury to assess the amount of such damages at its discretion.[2] In these circumstances, does Alabama's statute deprive appellant of its property without due process, deny equal protection of the laws, and impose excessive fines in violation of the Fourteenth and Eighth Amendments of the Constitution of the United States?

2. Has Alabama violated due process and equal protection guaranties when it excepts wrongful death actions (under its statute as construed and described in Question 1) from a statute[3] which restricts punitive damages awards in tort actions to acts of oppression, fraud, wantonness or malice proved by clear and convincing evidence; and which places a legislative ceiling of $250,000 on such awards?

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* In addition to the named parties, all of the common stock of Alabama Power Company is owned by The Southern Company.

[1] §§6-5-410 and 411, Alabama Code.

[2] Under Alabama law, a jury verdict is flawed only if it manifestly results from passion, bias, corruption or other improper motive. *Hammond v. City of Gadsden*, 493 So.2d 1374, 1378, *et seq.* (Ala. 1986).

[3] §§6-11-20 and 21, Alabama Code as amended.

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KAY CAPPS, Administratrix of
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On Appeal From the Supreme Court of Alabama

JURISDICTIONAL STATEMENT

Alabama Power Company ("APCo"), appellant, appeals from the final judgment of the Supreme Court of Alabama, and the contemporaneous opinion of that Court, which affirmed a $500,000 trial court judgment entered on a jury verdict against APCo in an action brought under Alabama's wrongful death statute. §§6-5-410 and 411, Alabama Code of 1975, as amended.[4]

The court below rejected APCo's contention that the Alabama wrongful death statute, long interpreted by the

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[4] The full text of the statute is appended.

Alabama courts as permitting punitive damages only — and as applied in this action to permit such damages for simple negligence *only* — violated several of APCo's important rights safeguarded by the Constitution of the United States.[5]

OPINION BELOW

The opinion of the Supreme Court of Alabama is unreported and appears as Appendix A.

JURISDICTION

The judgment of the Supreme Court of Alabama, affirming the $500,000 trial court judgment against APCo, was entered on January 29, 1988, and is attached as Appendix B. A notice of appeal to this court was timely filed in the Supreme Court of Alabama on February 29, 1988 and appears as Appendix C. This appeal is being docketed in this Court within 90 days from the date of the judgment below. The jurisdiction of this Court is invoked under 28 U.S.C. §1257(2).

CONSTITUTIONAL PROVISIONS AND STATUTES

AMENDMENT FOURTEEN

"No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

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[5] APCo presented to the trial court and to the Supreme Court of Alabama the issues, without limitation, of whether the judgments below deprive APCo of its property without due process and deny equal protection of the laws in violation of the Fourteenth Amendment; deprive APCo of its rights under the Fourth, Fifth, Sixth and Eighth Amendments as incorporated in the Fourteenth Amendment; and impose excessive fines in violation of the Eighth Amendment.

AMENDMENT EIGHT

"Excessive bail shall not be required, nor excessive fines imposed. . . ."

AMENDMENT FOUR

"The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no warrants shall issue, but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized."

Alabama Wrongful Death Statute, §6-5-410, Alabama Code as amended (Appendix D).

Alabama Punitive Damage Statute, §§6-11-20 and 6-11-21, Alabama Code as amended (Appendix E).

HOW THE FEDERAL QUESTION WAS RAISED

APCo presented the federal constitutional questions to the trial court below on post-trial motions for new trial and judgment n.o.v., after a jury verdict of liability and an award of damages. The trial court rejected this opportunity to correct its constitutional error and denied these motions. APCo renewed these constitutional challenges in its original and reply briefs in the Supreme Court of Alabama.[6] There APCo repeated its constitutional arguments that the Alabama wrongful death statute, as construed and applied, manifested constitutional infirmities of due process, equal protection, and excessive fines under the Fourteenth and Eighth Amendments; and presented 4, 5 and 6 Amendment questions as well.

Although the court below criticized APCo for not presenting its constitutional objections in the trial court "at the pleading

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[6] That Court did not permit oral argument.

stage, during the taking of evidence or even during the instructions to the jury," (A 4), without dispute the issues were presented to the state trial and appellate courts; and without dispute the court below "traced the genesis of the interpretation that the wrongful death statute allows only punitive damages, [and] stated that the rule was based on sound reasoning, and declined to overrule it after the many legislative recodifications of the statute with that interpretation. See, also, *Black Belt Wood Co. v. Sessions,* 514 So.2d 1249 (Ala. 1987)." (*Ibid*) Indeed, the two cases cited by the court below, *Merrell v. APCo,* 382 So.2d 494, 497 (Ala. 1980), and *Black Belt Wood Co. v. Sessions,* 514 So.2d 1249, 1261-1263 (Ala. 1987), recognized the long-standing judicial interpretation of Alabama's wrongful death statute as permitting punitive damages only; found no constitutional infirmity in the statute as so construed; and declined to modify this judicial interpretation.[7]

Accordingly, the federal constitutional questions now presented to this Court were pressed below and passed upon by the Supreme Court of Alabama in satisfaction of this Court's prudential "pressed and passed upon" rule. *Illinois v. Gates,* 462 U.S. 213, 218-220. As this Court taught in *Jenkins v. Georgia,* 418 U.S. 153, 157, the important circumstance is that the Supreme Court of Alabama "reached and decided" — against APCo's contentions and in favor of the wrongful death

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[7] For example, the court in *Black Belt* wrote (514 So.2d at 1263):

> "The history of the wrongful death statute indicates that the legislature is aware of the interpretation placed on the statute by this Court, and it has not amended it. Even though this Court has the power to abrogate the longstanding judicial interpretation of the wrongful death statute, it should, as a matter of public policy, leave any change of that interpretation to the legislature." (Footnotes omitted.)

statute as construed and applied — the constitutional issues presented below and here.[8]

STATEMENT OF THE CASE

Appellee, Capps, sued under Alabama's wrongful death statute, §§6-5-410 and 411, Alabama Code of 1975, and alleged that simple negligence on the part of appellant, APCo, was the proximate cause of the death of her then-husband, Richard D. Capps. He was electrocuted on July 19, 1984 when his raised dumptruck contacted an APCo electric transmission line located at a sand and gravel quarry site. A jury awarded $500,000 as punitive damages only in this death case in which only simple negligence was alleged or proved. The trial court entered judgment on this verdict on September 2, 1986, and later denied APCo's post-trial motions for judgment n.o.v. and new trial.

The Supreme Court of Alabama affirmed. It held that the verdict was amply supported by the evidence; that the award was not excessive; and declined to overrule or modify its earlier holdings that the imposition of punitive damages in wrongful

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[8] A failure to object to the trial court's oral charge does not preclude such review. The requirement of objection in the state procedural Rule 51 emulates Federal Rule 51, and federal cases construing the latter are authoritative. They hold that a failure to object to a trial court's oral charge does not transform an erroneous instruction of law into the "law of the case" so as to preclude appellate review of a denial of a motion for judgment n.o.v. *A fortiori* there is no such effect when the error of law transgresses the federal constitution. *Ebker v. Tan Jay International,* 739 F.2d 812, 825-826, n.17:

> "[W]e must review the district judge's order in light of the 'applicable law which is controlling, and not what the trial court announces the law to be in [its] instructions,' *Coca Cola Bottling Co. v. Hubbard,* 203 F.2d 859, 862 (8 Cir. 1953). See *Hanson v. Ford Motor Co.,* 278 F.2d 586, 592-93 (8 Cir. 1960) (Blackmun, J.); *Johnson v. United States,* 434 F.2d 240, 243 (8 Cir. 1970); 9 Wright & Miller, *supra,* §2537, at 599-600."

death cases, when simple negligence is the only asserted wrong, was free from constitutional infirmity.

For purposes of this appeal, APCo concedes, *arguendo,* the sufficiency of the evidence to support a claim of simple negligence and an absence of contributory negligence. It is incontestable that the plaintiff-administratrix, appellee, did not even attempt to prove any egregious misconduct by APCo. This appeal thus presents the stark question of whether the Alabama wrongful death statute — as construed and applied to permit only punitive damages and to permit such damages for simple negligence only — violates the several important constitutional rights and safeguards asserted by APCo.

Moreover, as will be elaborated, the constitutional error below is exacerbated by the circumstance that the Alabama legislature in 1987 enacted a statute,[9] which excepts "civil actions for wrongful death pursuant to . . . §6-5-410" from a statutory requirement that punitive damages may only be awarded "where it is proven by clear and convincing evidence that the defendant consciously or deliberately engaged in oppression, fraud, wantonness, or malice with regard to the plaintiff;"[10] and from a statutory ceiling of $250,000 on punitive damages.

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[9] Now codified as §6-11-20 through 6-11-30, Alabama Code, as amended, and appended as Appendix E.

[10] The terms fraud, malice, wantonness, oppression, and clear and convincing evidence are defined in the statute. Section 6-11-20.

THE QUESTIONS ARE SUBSTANTIAL

This case presents important constitutional questions regarding substantive and procedural standards for the imposition of punitive damages in tort cases.[11]

There is pending for decision by this Court the case of *Bankers Life & Casualty Co. v. Crenshaw,* 85-1765, argued on November 30, 1987. That case presents the question of whether a punitive damage award of $1,600,000 — compared with $20,000 compensatory — violates the excessive fines prohibition of the Eighth Amendment, and due process and equal protection guaranties of the Fourteenth Amendment. *Bankers Life* presents as well the grave constitutional consequences of an absence of legislative standards designed to govern the award of punitive damages, and the concomitant risk of jury awards which are inevitably capricious, unpredictable, elusive and indeterminate.

The questions in this case come within those presented in *Bankers Life,* and present the additional ones specified, *supra* — questions which have not been, but should be settled by this Court; and, additionally, ones which the state court below has decided in conflict with applicable decisions of this Court.

In *Smith v. Wade,* 461 U.S. 30, this Court addressed the issue of the degree of misconduct essential to support an award of

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[11] APCo is aware that this Court in *Louis Pizitz Dry Goods Co. v. Yeldell,* 274 U.S. 112, upheld the Alabama wrongful death statute against a charge of unreasonableness, oppressiveness and arbitrariness in violation of the Fourteenth Amendment. This Court did so, however, on the "assumption that its scope was . . . limited [by *Mobile Electric Co. v. Fritz,* 200 Ala. 692, 693, 70 So.235, which it cited] and we so interpret the statute." (274 U.S. at 114, 115) In *Mobile Electric v. Fritz,* a verdict of wantonness as well as simple negligence was upheld; and the Alabama court there assumed that damages would "in some measure [be] proportioned to the degree of culpability." (200 Ala. at 693.)

punitive damages in a civil rights action under 42 U.S.C. §1983. Although divided 5-4 on the issue of whether evil motive or intent was required, as distinguished from recklessness or callous indifference, this Court was unanimous in its conclusion that long-standing American tort law required proof of more than simple negligence to support an award of punitive damages. The majority of five, speaking through Justice Brennan, applied the rule that "punitive damages may be awarded for conduct that is outrageous, because of the defendant's evil motive or his reckless indifference to the rights of others." (461 U.S. at 46-47)[12]

Chief Justice Rehnquist, speaking for a minority of four who would require more, namely, a showing of intent or evil motive, sharply criticized punitive damages as "a windfall to plaintiffs, who are entitled to receive full compensation for their injuries — but no more;"[13] and "unaccompanied by the types of safeguards present in criminal proceedings . . . exacerbated by the fact that punitive damages are frequently based upon the caprice and prejudice of jurors."[14] And, most important in the case at bar, Chief Justice Rehnquist rejected the majority's analysis of an early decision, *Philadelphia etc. R. Co. v. Quigley,* 21 Howard 202, 16 L.Ed. 73 (1859) for the very reason

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[12] Justice Brennan explained (461 U.S. at 54):

> "This common-law rule makes sense in terms of the purposes of punitive damages. Punitive damages are awarded in the jury's discretion 'to punish [the defendant] for his outrageous conduct and to deter him and others like him from similar conduct in the future.' Restatement (Second) of Torts §908(1) (1979). The focus is on the character of the tortfeasor's conduct — whether it is of the sort that calls for deterrence and punishment over and above that provided by compensatory awards."

[13] 461 U.S. at 59.

[14] *Ibid.*

that this analysis would have that case stand for the proposition that "punitive damages would be available for simple negligence. *Plainly our decision in Quigley does not stand for this remarkable proposition.*" (461 U.S. at 69; emphasis supplied).[15]

Yet Alabama's wrongful death statute — unique in the United States — does presently stand for this "remarkable proposition" if the judgment below stands.

Since its inception, our constitution has protected against the invidious result of such unique and monstrous irrationality and consequent oppression. Recent commentators, even on the assumption that an award of punitive damages requires proof of egregious misconduct over and above simple negligence,[16] have questioned the constitutionality of punitive damages procedures under the due process and equal protection clauses; and the Fourth, Fifth and Sixth Amendments as incorporated in the

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[15] Earlier, in *City of Newport v. Fact Concerts,* 453 U.S. 247, 266-267, this Court characterized punitive damages and noted their underlying requirements:

> "Punitive damages by definition are not intended to compensate the injured party, but rather to punish the tortfeasor whose wrongful action was intentional or malicious, and to deter him and others from similar *extreme* conduct. See Restatement (Second) of Torts, §908 (1979); W. Prosser, Law of Torts 9-10 (4th ed 1971)." (Emphasis supplied.)

[16] See Wheeler at 282: "To award punitive damages . . . the jury must find that the defendant acted maliciously, in 'wanton and reckless disregard for the rights of others,' with 'flagrant indifference' to the rights of others, or in an 'outrageous manner, . . .' " (Footnotes omitted.)

Fourteenth Amendment. Wheeler, *The Constitutional Case for Reforming Punitive Damages Procedures,* 69 Va.L.Rev. 269 (1983) ("Wheeler").[17]

Another commentator[18] has urged that punitive damages awards offend due process as fundamentally unfair and offensive to traditional notions of fair play and justice; and are excessive fines in violation of the Eighth Amendment. *A fortiori* Alabama's wrongful death statute as construed to permit punishment for simple negligence offends these constitutional guaranties.[19]

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[17] Wheeler concludes (at 351):

> "Courts have awarded punitive damages in the United States for more than a century. It is surprising, but true, that the Supreme Court has never considered whether due process requires that defendants in punitive damages cases be afforded procedural protection not afforded to defendants in other civil actions. It is equally surprising, and equally true, that the Court has never considered whether fourth, fifth and sixth amendment safeguards apply in actions for punitive damages in jurisdictions where the avowed purpose of such relief is to punish and to deter. This article has argued that punitive damages defendants are entitled to have the punitive award limited by a statutory maximum and to be protected by mandatory bifurcation of trials, proof by clear and convincing evidence as to the substantive basis for a punitive damages award, all of the safeguards of the fourth and fifth amendments, and finally, most of the safeguards of the sixth amendment."

[18] Jeffries, *A Comment on the Constitutionality of Punitive Damages,* 72 Va.L.Rev. 139 (1986).

[19] It thus exacerbates the circumstance described (72 Va.L.Rev. at 150-151):

> "Indeed, the common designation of 'punitive' or 'exemplary' damages implies that such awards have historically been regarded as punishment, at least in this country. Like most forms of

Alabama's wrongful death statute, as construed and applied in the case at bar, cannot stand federal constitutional muster and must be invalidated. The imposition of punitive damages — punishment — for simple negligence is a constitutional monstrosity — an "unhealthy excrescence."[20] The Alabama wrongful death statute falls far short of "due process" — eloquently described by Justice Frankfurter as a:

> "profound attitude of fairness between man and man, and more particularly between the individual and government. * * * Due process is not a mechanical instrument. It is not a yardstick. It is a process. It is a delicate process of adjustment inescapably involving the exercise of judgment by those whom the Constitution entrusted with the unfolding of the process." *Joint Anti-Fascist Refugee Com. v. McGrath,* 341 U.S. 123, 162-163.[21]

Belatedly, in 1987, Alabama's legislature recognized that awards of punitive damages in civil actions should be restricted to acts of oppression, fraud, wantonness, or malice proved by

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punishment, punitive damages require a finding of scienter — typically, that the defendant acted maliciously or with callous disregard for the rights of others. Obviously, punitive damages further the traditional aims of punishment, namely retribution and deterrence, and are usually supported on precisely such grounds. The behavior sanctioned by punitive liability is usually also subject to criminal prosecution, at least where it is performed with the requisite culpability. Finally, no alternative purpose can rationally be thought to account for current practice in awarding punitive damages, largely because of the great disparity between the size of the awards entered and any nonpunitive purpose they might be imagined to serve. (Footnotes omitted.)"

[20] *Smith v. Wade,* 461 U.S. 30, 58, Rehnquist, J., dissenting.

[21] APCo, of course, insists on the other federal constitutional violations argued above.

clear and convincing evidence;[22] and that a legislative ceiling of $250,000 should replace "a jury discretion over the amounts awarded . . . limited only by the gentle rule that they not be excessive."[23] Unfortunately, however, this same legislation excepted "civil actions for wrongful death" from its prudential scope. But the exception is constitutionally impermissible. It emphasizes the due process and equal protection infirmities of the wrongful death act, construed and applied in the case at bar, which permits punitive damages only — without ceiling — for simple negligence only, proved by a mere preponderance of the evidence. The bizarre nature of this attempted classification, and its arbitrary distinction, rationally furthers no legitimate state purpose;[24] and the distinction between punitive damage awards in wrongful death actions and punitive damage awards in all other tort actions "bears no relation to the statutory purpose."[25] When varying treatment is so unrelated to the achievement of any legitimate purpose a court must conclude that the legislature's actions were irrational, and due process and equal protection require invalidation. *See Pennell v. City of San Jose,* ____ U.S. ____, 56 U.S.L.W. 4168, 4171 (1988). The Alabama wrongful death statute, as thus construed and applied, must fall.

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[22] Section 6-11-20 through 6-11-30, Alabama Code, as amended, Appendix E.

[23] *Gertz v. Welch,* 418 U.S. 323, 350. The new Alabama statute has exceptions to this ceiling which are inapplicable to this case.

[24] *Zobel v. Williams,* 457 U.S. 55, 60.

[25] *Williams v. Vermont,* 472 U.S. 14, 24.

CONCLUSION

For the foregoing reasons, this Court should note probable jurisdiction of this appeal.[26]

Respectfully submitted,

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[26] Should this Court conclude that the proper mode of review is by certiorari, then this jurisdictional statement should be regarded and acted on as a petition for writ of certiorari and that writ should be granted. 28 U.S.C. §2103.

PROOF OF SERVICE

This is to certify that a copy of the within and foregoing Jurisdictional Statement has been served upon all counsel of record by depositing same in the United States mail, first-class, postage prepaid and properly addressed as followed:

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This 25th day of March, 1988.

M. Roland Nachman, Jr.

APPENDIX

APPENDIX A

THE STATE OF ALABAMA — JUDICIAL DEPARTMENT
THE SUPREME COURT OF ALABAMA
OCTOBER TERM, 1987-88

86-366

Alabama Power Company

v.

Kay Capps, administratrix of the estate
of Richard D. Capps, deceased

Appeal from Butler Circuit Court

(Released January 29, 1988)

ALMON, JUSTICE.

Kay Capps, as administratrix of the estate of Richard D. Capps, deceased, filed this action against Alabama Power Company, charging Alabama Power with the wrongful death of Richard Capps. Capps was electrocuted when he raised the bed of his dump truck into Alabama Power's electrical distribution lines. The trial court entered judgment on the jury's verdict awarding $500,000 to Mrs. Capps. Alabama Power argues that the trial court erred in denying its motion for new trial because the verdict was against the great weight and preponderance of the evidence; that the damages were excessive; that it is unconstitutional to impose punitive damages in wrongful death cases, such as this one, where the alleged wrongful conduct amounts only to negligence; and that the statutory 10% affirmance penalty is unconstitutional.

We find no merit to the argument that the verdict was against the great weight and preponderance of the evidence. The electrocution took place at a sand and gravel mining operation, and the essential theory of liability was that Alabama Power installed or maintained its distribution lines with too low a vertical clearance for this location, where large items of equipment, such as the dump truck in this case, routinely passed. The

evidence created a jury question as to what was a safe height for the lines and as to what the actual height was. Alabama Power undisputedly knew that the large items of equipment were present in the vicinity of the lines. These lines were installed specifically to serve this mining operation. Indeed, a large piece of equipment had torn down the lines about 200 yards from the site of this particular occurrence less than two months earlier.

Alabama Power also argues that Capps was contributorily negligent, but we agree with the trial court that the evidence presented a jury question on this issue also, and that the evidence did not so conclusively show contributory negligence as to require that the verdict be set aside. Therefore, the trial judge did not err in denying Alabama Power's motion for new trial on the ground that the verdict was against the great weight and preponderance of the evidence. See generally, *Alabama Power Co. v. Cantrell,* 507 So.2d 1295 (Ala. 1987), appeal docketed, 56 U.S.L.W. 3166 (U.S. Aug. 20, 1987) (No. 87-294); *Alabama Power Co. v. Brooks,* 479 So.2d 1169 (Ala. 1985); *Alabama Power Co. v. Alexander,* 370 So.2d 252 (Ala. 1979).

Nor do we find the award of $500,000 to be excessive. A verdict and judgment of $1,000,000 was upheld in *Cantrell, supra,* under a theory of liability very similar to that in the present case, and the facts in this case certainly show no less culpability than those in *Cantrell.* The trial court, citing *Hammond v. City of Gadsden,* 493 So.2d 1374 (Ala. 1986), entered the following findings, among others, in denying Alabama Power's motion for remittitur or new trial:

> "There was an abundance of evidence presented in this case from which the jury could find that the Alabama Power Company knew or should have known that their uninsulated power line created a dangerous condition and that persons, while working in the area where the accident occurred, might come in contact therewith. This evidence included testimony that the line in question was low; that its vertical clearance violated recognized safety standards;

> that large mining equipment and trucks had operated in close proximity to the line for several years; that defendant's meter readers had gone within a few feet of the line on a monthly basis for several years prior to the accident; that the Alabama Power Company failed to follow its own inspection standards concerning pole inspection on the line involved in this suit; and, that shortly before [Mr. Capp's] death a piece of large mining equipment, used in the area, severed the electrical line, completely pulling it to the ground within close proximity to the accident site causing Alabama Power Company to go to the area to repair the same.
>
> "There was evidence that the defendant, Alabama Power Company, was on notice of a dangerous condition and, in violation of their own and the industry's accepted safety rules, took no action to inspect or correct the problem and the resulting low hanging uninsulated wire caused the death of Richard Capps."

Alabama Power's argument that the damages were excessive presents no ground for reversal.

Alabama Power places most of its emphasis on its argument that the imposition of punitive damages in wrongful death cases is unconstitutional, at least as applied in this case. See Code 1975, §6-5-410, and annotations thereto. Capps correctly points out, however, that Alabama Power did not raise this argument until it made its post-trial motions.

> "An appellant cannot invoke action by a court and have a case tried on certain issues and then later, when dissatisfied with the result, raise an entirely new issue, such as the constitutionality of the statutes under which he was proceeding, on motion for a new trial."

Talley v. A & M Construction Co., 284 Ala. 371, 373, 225 So.2d 359, 360 (1969), cert. denied, 397 U.S. 995 (1970), (citations omitted). If Alabama Power had objected to proceeding under

the theory of punitive damages at the pleading stage, during the taking of evidence, or even during the instructions to the jury, the trial court would have been presented with the constitutional issues now argued and, if it had accepted the argument, could have saved the time and expense of trial under the allegedly unconstitutional theory of damages. Instead, Alabama Power waited to challenge the application of punitive damages until a verdict was returned under that theory, which it cannot do.

In *Merrell v. Alabama Power Co.*, 382 So.2d 494 (Ala. 1980), this Court held that the constitutionality of the imposition of punitive damages under the wrongful death statute could not be raised for the first time on appeal. In that case, the complaint had been dismissed because the plaintiff had insisted upon proceeding under the theory of compensatory damages, so there was even less reason there than here to apply the rule that constitutional questions must be timely raised. *Merrell* also traced the genesis of the interpretation that the wrongful death statute allows only punitive damages, stated that the rule was based on sound reasoning, and declined to overrule it after the many legislative recodifications of the statute with that interpretation. See, also, *Black Belt Wood Co. v. Sessions,* 514 So.2d 1249 (Ala. 1987).

Alabama Power argues that, in the event the judgment is affirmed, the 10% affirmance penalty imposed by Code 1975, §12-22-72, should not be applied because it is unconstitutional. This argument is moot, because the legislature has repealed the 10% penalty, effective as to all judgments affirmed after June 11, 1987. 1987 Ala. Acts, No. 87-188.

The judgment is affirmed.

AFFIRMED.

Torbert, C. J., and Maddox, Jones, and Beatty, JJ., concur.

APPENDIX B

THE STATE OF ALABAMA — JUDICIAL DEPARTMENT
IN THE SUPREME COURT OF ALABAMA

86-366

BUTLER CIRCUIT COURT

#CV 85-98

Alabama Power Company

v.

Kay Capps, as Administratrix of the Estate
of Richard D. Capps, Deceased

CERTIFICATE OF JUDGMENT

of Affirmance

(January 29, 1988)

The appeal in this cause having been duly submitted, IT IS CONSIDERED, ORDERED AND ADJUDGED that the judgment of the court below is affirmed.

IT IS FURTHER ORDERED that the costs of appeal be taxed against the appellant(s) as provided by Rule 35, Alabama Rules of Appellate Procedure.

OPINION BY ALMON, J.

TORBERT, CJ., MADDOX, JONES AND BEATTY, JJ., CONCUR.

APPENDIX C

IN THE SUPREME COURT OF ALABAMA

Case No. 86-366

Alabama Power Company,
Appellant,

v.

Kay Capps, Administratrix of the
Estate of Richard D. Capps, Deceased,
Appellee.

NOTICE OF APPEAL

(Filed: February 29, 1988)

Notice is hereby given that Alabama Power Company ("APCo"), the appellant above-named, hereby appeals to the Supreme Court of the United States from the opinion and final judgment of the Supreme Court of Alabama affirming the judgment of a state trial court of September 2, 1986, entered in this action on January 29, 1988.

This appeal is taken pursuant to 28 U.S.C., §1257(2).

/s/ M. Roland Nachman, Jr.

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PROOF OF SERVICE

This is to certify that a copy of the within and foregoing Notice of Appeal has been served upon all counsel of record by depositing same in the United States mail, first-class, postage prepaid and properly addressed as followed:

The Honorable Don E. Siegelman
Attorney General, State of Alabama
11 South Union Street
Montgomery, Alabama 36130

John A. Taber, Esq.
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This 29th day of February, 1988.

/s/M. Roland Nachman, Jr.

APPENDIX D

§6-5-410. Wrongful act, omission or negligence causing death.

(a) A personal representative may commence an action and recover such damages as the jury may assess in a court of competent jurisdiction within the state of Alabama, and not elsewhere, for the wrongful act, omission or negligence of any person, persons or corporation, his or their servants or agents, whereby the death of his testator or intestate was caused, provided the testator or intestate could have commenced an action for such wrongful act, omission or negligence if it had not caused death.

(b) Such action shall not abate by the death of the defendant, but may be revived against his personal representative and may be maintained though there has not been prosecution, conviction or acquittal of the defendant for the wrongful act, omission or negligence.

(c) The damages recovered are not subject to the payment of the debts or liabilities of the testator or intestate, but must be distributed according to the statute of distributions.

(d) Such action must be commenced within two years from and after the death of the testator or intestate. (Code 1852, §§1940, 1941; Code 1867, §§2299, 2300; Code 1876, §§2641-2643; Code 1886, §2589; Code 1896, §27; Code 1907, §2486; Acts 1911, No. 455, p. 484; Code 1923, §5696; Code 1940, T. 7, §123.)

§6-5-411. Injuries to decedent's property resulting from wrongful act, etc., causing death.

(a) The personal representative of a deceased person may commence an action in a court of competent jurisdiction within the state of Alabama, and not elsewhere, and recover such damages as the jury may assess for injuries or damages to the property of the decedent resulting from the same wrongful act, omission or negligence which caused the death of the decedent,

provided the decedent could have commenced such action if the wrongful act, omission or negligence causing the property damage had not also caused his death.

(b) Such action may be commenced though there has not been prosecution, conviction or acquittal of the defendant for the wrongful act, omission or negligence; and it shall not abate by the death of the defendant, but may be revived against his personal representative.

(c) The damages recovered are not subject to the payment of the debts or liabilities of the decedent, but must be distributed according to the statute of distributions. (Acts 1956, 1st Ex. Sess., No. 113, p. 170.)

APPENDIX E

§6-11-20. Punitive damages not to be awarded other than where clear and convincing evidence proven; definitions.

(a) Punitive damages may not be awarded in any civil action, except civil actions for wrongful death pursuant to sections 6-5-391 and 6-5-410, other than in a tort action where it is proven by clear and convincing evidence that the defendant consciously or deliberately engaged in oppression, fraud, wantonness, or malice with regard to the plaintiff. Nothing contained in this article is to be construed as creating any claim for punitive damages which is not now present under the law of the state of Alabama.

(b) As used in this article, the following definitions shall apply:

(1) FRAUD. An intentional misrepresentation, deceit, or concealment of a material fact the concealing party had a duty to disclose, which was gross, oppressive or malicious and committed with the intention on the part of the defendant of thereby depriving a person or entity of property or legal rights or otherwise causing injury.

(2) MALICE. The intentional doing of a wrongful act without just cause or excuse, either:

a. With an intent to injure the person or property of another person or entity, or

b. Under such circumstances that the law will imply an evil intent.

(3) WANTONNESS. Conduct which is carried on with a reckless or conscious disregard of the rights or safety of others.

(4) CLEAR AND CONVINCING EVIDENCE. Evidence that, when weighed against evidence in opposition, will produce in the mind of the trier of fact a firm conviction as to each essential element of the claim and a high probability as to the correctness of the conclusion. Proof by clear and convincing evidence requires a level of proof greater than a preponderance of the evidence or the substantial weight of the evidence, but less than beyond a reasonable doubt.

(5) OPPRESSION. Subjecting a person to cruel and unjust hardship in conscious disregard of that person's rights. (Acts 1987, No. 87-185, §1.)

§6-11-21. Punitive damages not to exceed $250,000.00; exceptions.

An award of punitive damages shall not exceed $250,000,00, unless it is based upon one or more of the following:

(1) A pattern or practice of intentional wrongful conduct, even though the damage or injury was inflicted only on the plaintiff; or,

(2) Conduct involving actual malice other than fraud or bad faith not a part of a pattern or practice; or,

(3) Libel, slander or defamation. (Acts 1987, No. 87-185, §2.)

APPENDIX F

§6-11-22. Grounds for mistrial if limitations mentioned in presence of jury.

Argument or mention, in the presence of the jury, of the classifications or limitations established in section 6-11-21 above is not permissible and shall be ground for a mistrial. (Acts 1987, No. 87-185, §3.)

§6-11-23. No presumption of correctness; court to conduct hearings; admissible relevant evidence; trial court to independently reassess award of punitive damages.

(a) No presumption of correctness shall apply as to the amount of punitive damages awarded by the trier of the fact.

(b) In all cases wherein a verdict for punitive damages is awarded, the trial court shall, upon motion of any party, either conduct hearings or receive additional evidence, or both, concerning the amount of punitive damages. Any relevant evidence, including but not limited to the economic impact of the verdict on the defendant or the plaintiff, the amount of compensatory damages awarded, whether or not the defendant has been guilty of the same or similar acts in the past, the nature and the extent of any effort the defendant made to remedy the wrong and the opportunity or lack of opportunity the plaintiff gave the defendant to remedy the wrong complained of shall be admissible; however, such information shall not be subject to discovery, unless otherwise discoverable until after a verdict for punitive damages has been rendered. After such post verdict hearing the trial court shall independently (without any presumption that the award of punitive damages is correct) reassess the nature, extent and economic impact of such an award of punitive damages, and reduce or increase the award if appropriate in light of all the evidence. (Acts 1987, No. 87-185, §4.).

§6-11-14. No presumption of correctness to apply to damages on apeal.

(a) On appeal, no presumption of correctness shall apply to the amount of punitive damages awarded.

(b) The appellate court shall independently reassess the nature, extent and economic impact of such an award and reduce or increase the award if appropriate in light of all the evidence. (Acts 1987, No. 87-185, §5.)

§6-11-25. Ability of court to set aside damages not limited.

Nothing in this article is intended to limit the ability of a trial or appellate court to set aside or reverse an award of punitive damages, or to order a new trial. (Acts 1987, No. 87-185, §6.)

§6-11-26. No punitive damages awarded against state or agency thereof.

Punitive damages may not be awarded against the state of Alabama or any county or municipality thereof, or any agency thereof, except any entity covered under the Medical Liability Act now codified as section 6-5-480 et seq., or any acts amendatory thereto. (Acts 1987, No. 87-185, §7.)

§6-11-27. Principal, master, etc., not liable for punitive damages for conduct of agent, servant, etc.; exceptions.

(a) A principal, employer or other master shall not be liable for punitive damages for intentional wrongful conduct or conduct involving malice based upon acts or omissions of an agent, employee or servant of said principal, employer or master unless the principal, employer or master either: (i) knew or should have known of the unfitness of the agent, employee or servant, and employed him or continued to employ him, or used his services without proper instruction with a disregard of the rights or safety of others; or (ii) authorized the wrongful conduct; or (iii) ratifed the wrongful conduct; or unless the acts of the agent, servant or employee were calculated to or did benefit the prin-

cipal, employer or other master, except where the plaintiff knowingly participated with the agent, servant or employee to commit fraud or wrongful conduct with full knowledge of the import of his act.

(b) Nothing contained in this section shall be construed to prevent recovery of punitive damages against a retail vendor of alcoholic beverages arising out of the acts of its agents, servants or employees acting within the line and scope of their employment. (Acts 1987, No. 87-185, §8.)

§6-11-28. No cause of action created.

Nothing contained in this article shall be construed to grant or create a cause of action or right to recover punitive damages. (Acts 1987, No. 87-185, §9.)

§6-11-29. Wrongful death actions not affected.

This article shall not pertain to or affect any civil actions for wrongful death pursuant to sections 6-5-391 and 6-5-410, as amended. (Acts 1987, No. 87-185, §10.)

§6-11-30. Effective date.

This article shall not affect the rights of any person if such rights accrued prior to June 11, 1987. (Acts 1987, No. 87-185, §12.)